



Signed and Filed: October 15, 2010

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 09-32424 TEC
)	
CAROLINE BROWN,)	Chapter 7
)	
)	
Debtor.)	
)	
SUMI LIM,)	Adv. Proc. No. 09-3201 TC
)	
Plaintiff,)	
)	
vs.)	
)	
)	
CAROLINE BROWN,)	
)	
Defendant.)	

MEMORANDUM RE DEFENDANT'S RULE 12(b)(6)
MOTION TO DISMISS FIRST AMENDED COMPLAINT

On May 21, 2010, the court held a hearing on Defendant's Rule 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint (the Motion). Plaintiff appeared in pro per. Wayne A. Silver appeared on behalf of Defendant. Upon due consideration, and for the reasons stated herein, the court determines that the amended complaint fails to state a claim upon which relief can be granted, and that the amended complaint should be dismissed without leave to

1 amend, because Plaintiff has not alleged in either complaint that
2 Debtor committed fraud.

3 On November 16, 2009, pursuant to section 523(a)(2), Plaintiff
4 filed a complaint seeking to render nondischargeable in Debtor's
5 bankruptcy case a loan made by Plaintiff to invest in a luxury
6 apartment complex in Arizona. The complaint alleged that Plaintiff
7 invested an unspecified sum in the Arizona property, because
8 Debtor's husband Terry Brown, who is not a debtor in bankruptcy,
9 was an experienced and successful real estate developer.

10 On January 29, 2010, the court granted Debtor's motion to
11 dismiss the complaint, on the grounds that Plaintiff had failed to
12 allege: (1) to whom Plaintiff loaned the money and the amount of
13 the loan; (2) what specific representations Debtor made to
14 Plaintiff and when they were made; (3) whether those
15 representations were false when made; (4) whether Debtor intended
16 to deceive Plaintiff in making the representations; (5) whether
17 Plaintiff justifiably relied on Debtor's statement or conduct; and
18 (6) whether Plaintiff's damage was proximately caused by her
19 reliance of Debtor's statements or conduct.

20 The order granting the motion to dismiss incorporated the
21 parties' stipulation that Plaintiff could bring a state-court
22 action to enforce the guaranty against Terry Brown.

23 On March 5, 2010, Plaintiff filed an amended complaint. Like
24 the original complaint, the amended complaint alleges a single
25 claim under section 523(a)(2)(A). The amended complaint alleges
26 the amount of money Plaintiff loaned (\$50,000), the date on which
27 it was loaned (March 22, 2006), and the payee (Real Estate Trust
28 Account). The amended complaint alleges that the loan was

1 guaranteed by Debtor and by Terry Brown. The amended complaint
2 alleges that Plaintiff loaned the money after attending several
3 presentations by *Terry Brown*, who held himself out to be an
4 experienced and successful real estate developer. The amended
5 complaint does not allege any representations made by *Debtor* to
6 Plaintiff, or any of the other elements material to a section
7 523(a)(2)(A) claim, such as when the misrepresentations were made,
8 whether they were false when made, whether Debtor intended to
9 deceive Plaintiff in making the representations, whether Plaintiff
10 justifiably relied on Debtor's statement or conduct, and whether
11 Plaintiff's damage was the proximately caused by her reliance on
12 Debtor's statements or conduct. Nor does the amended complaint
13 allege that Debtor a partner in her husband's alleged fraud. Thus,
14 the amended complaint does not state a claim under section
15 523(a)(2). Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246
16 (9th Cir. 2001); In re Tsurukawa, 287 B.R. 515 (9th Cir. BAP 2002);
17 see McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000).

18 Because neither the complaint nor the first amended complaint
19 allege any fraud by Debtor or active participation by Debtor in a
20 fraudulent scheme with her husband, it is appropriate to dismiss
21 the amended complaint with prejudice. See Allen v. City of Beverly
22 Hills, 911 F.2d 367, 373-74 (9th Cir. 1990) (court has broad
23 discretion to deny leave to amend when plaintiff has previously
24 amended its complaint).

25 **END OF MEMORANDUM**
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1 **Court Service List**

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Sumi Lim

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Berkeley, CA 94709

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